IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

INCOME TAX APPEAL NO. 102 OF 2002

Dilip N. Shroff, Karta of
N.D.Shroff Smaller H.U.F. .. Appellant

v/s.

1. Joint Commissioner of Income Tax,
Special Range 7, Mumbai & anr... Respondents

Mr. S.J.Mehta for appellant.

Mr.K.R.Chaudhary i/by Mr. P.Kapur for respondents.

CORAM : R.M.LODHA AND
J.P.DEVADHAR, JJ.

DATED : 10th August, 2004

P.C.

Heard Mr. S.J. Mehta, the learned counsel

for the assessee-appellant.

2. The assessee for the assessment year 1998-99 declared income of Rs.30,80,030/-. The assessee is an H.U.F. and his case was selected for scrutiny. In his return, the assess had shown long term capital loss of Rs.34,12,000/- on account of sale of property being land and building known as Jekison Niwas, 220 Walkeshwar Road, Mumbai. The assessee is said to have 1/4th share in the property. According to the assessee, his share was sold for consideration of Rs.8 crores. The assessee adopted the cost of acquisition as on

01.04.1981 at Rs.2,25,00,000/- as per the report dated 25.6.1996 of the registered valuer. The report of the registered valuer based on which the assessee declared long term capital loss was not found acceptable since as per the department's valuation officer, the fair market value of the assessee's share in the property as on 1.4.1981 was at Rs.1,44,92,907/- as against Rs.2,52,00,000/- shown by the assessee. The assessing officer accordingly, rejected the assessee's contention that fair market value of the property as on 1.4.1981 was Rs.2,52,00,000/- for computing the long term capital gains. Rather, the assessing officer adopted the cost of acquisition as on 1.4.1981 at Rs.1,44,,92,907/- and computed long term capital gains at Rs.3,09,78,478/- as against the long term capital loss of Rs.34,12,000/- shown by the assessee. The assessing officer completed the assessment on total income of Rs.3,40,59,510/-. The said assessment order attained finality as no appeal was preferred by the assessee. The penalty proceedings were initiated against the assessee by issuance of the show-cause notice. After the reply was submitted by the assessee, the assessing officer concluded that the assessee furnished inaccurate income in respect of the amount added under the head 'capital gains' and imposed the minimum penalty. The appeal was preferred by the assessee unsuccessfully before the CIT (Appeals)

unsuccessfully and then the assessee carried the matter to the Tribunal. The Tribunal dismissed the appeal and held that imposition of the penalty under section 271(1)(c) was justified in the facts and circumstances of the present case.

3. Mr. S.J.Mehta, the learned counsel for the assessee vehemently contended that there was only difference of opinion amongst the two valuers and on the basis thereof, the assessee could not have been held guilty of concealment of furnishing inaccurate particulars and no penalty could be levied under section 271(1)(c). In support of his contention, Mr.Mehta relied upon the judgment of Madras High Court in the case of T.P.K.Ramalingam v. Commissioner of Income Tax, 211 ITR 520 and the judgment of the learned Single Judge of this court in the case of Lachman Chaturbhuj Java v. R.G.Nitsure and ors., 132 ITR 631.

4. We are not persuaded by the submission of the learned counsel for the assessee. The revenue authorities as well as the Income Tax Appellate Tribunal have concurrently held that the assessee furnished inaccurate particulars. This finding is based on the aspect that the valuation report submitted by the assessee did not reflect the correct cost of acquisition. What is the market value of the property as on 01.04.1981 is an aspect

of fact and the value furnished by the assessee was held to be factually incorrect. If the computation of the long term capital gains by the assessee was found to be wrong obviously, the finding of the revenue authorities and the Tribunal that the assessee furnished inaccurate particulars cannot be faulted. The Tribunal in its order considered the matter thus-

> "11. In the case before us much stress has been laid on disclosure of all material facts in respect of sale of 1/4th share of the property in the return. It has also been vehemently argued before us that long term capital loss was computed by the assessee on the basis of registered valuer's report and long term capital gain has been computed on the basis of DVO's report. There is, thus, only difference of opinion between the two valuers and therefore the assessee cannot be charged for concealing either the particulars of income or furnishing inaccurate particulars. We are afraid that the above arguments cannot be accepted what is enjoined upon the assessee is a duty to make a correct and complete disclosure of his income and not only of the material facts such as disclosure of the details of the property and factum of the sale thereof as in the assessee's case. As stated earlier the assessee disclosed long term capital loss of Rs.34,12,000/- and claimed carry forward thereof to the subsequent year as against taxable long term capital gain of Rs.3,09,78,428/-. The disclosure made of the particulars of income in the return under the head capital gain by the assessee is certainly incorrect for which the impugned penalty is exigible. The assessee cannot take shelter under a report of a registered valuer which is found by the revenue authorities to have been prepared without due regard to the accepted principles of valuation. The rules enjoin upon a registered valuer to make an impartial and true valuation of any asset which he is required to value. The revenue authorities have recorded the finding that all was not well with the valuation made by

the registered valuer and significant omissions on the part of the registered valuer have been brought on record inasmuch as even the sale instances relevant for the purpose of valuation had not been relied upon by the registered valuer. The valuation made by the DVO on the other hand is ion the basis of relevant sale instances. Records do not show that either the assessee or the registered valuer raised any worthwhile objection to the report furnished by the DVO.

12. Acceptance by the assessee of the value of his share of property as on 1.4.1981 estimated in the DVO's report for computation of capital gains is an important factor to be noticed. The plea of the assessee that the valuation made by the DVO has been accepted for the sake of mental peace and to cooperate with the department is worthy of no credence and has to be rejected out-right. This is because such a plea has absolutely no bearing on the conduct of the assessee in furnishing inaccurate particulars of his income.

13. It is not a case simplicitor of difference of opinion between the two valuers. We are conscious of the observations of Hon'ble Madras High Court in Apsara Talkie's case supra to the effect that a valuation is not an exact instrument of measurement and that it is only an estimate and no two valuers will agree on the same subject. The above observations of the Hon'ble High Court as also other decisions relied upon by the assessee are in the context of estimate made by the registered valuer/departmental valuer vis-a-vis the actual cost of construction shown by the assessee as per his books. In the case before us, the difference in the valuation between the registered valuer and the DVO arose on account of incorrect application of the principles of valuation or non-adherence thereto by the registered valuer as against the valuation made by the DVO as per accepted norms of valuation which valuation has been accepted by the assessee.

14. As stated earlier, perusal of the orders of the revenue authorities will make it abundantly clear that the impugned penalty has been levied upon the assessee for furnishing inaccurate particulars of income under the main clause of sec.

271(1)(c). The AO has incidentally mentioned that 'further, Explanation 1 to section also applies to the case.' This by itself would not vitiate the penalty order. Therefore, reliance by the ld. counsel for the assessee on the decision in the case of P.N.Shah's case supra is misplaced. In that case the asstt.year involved was 1967-68. In the asstt. proceedings the I.T.O. recorded his satisfaction that the assessee had concealed his income amounting in allot Rs.2,14,510/-. Since the minimum penalty exceeded Rs.1,000/- the I.T.O. referred the proceedings to the I.A.C. The notice was issued by both the authorities, namely, I.T.O./I.A.C. under cl.(c) of sub-sec (1) of sec. 271. The IAC, however, held that the Explanation to sec. 271(1)(c) was attracted and the quantified the penalty at Rs.65,000/-. It was in this backdrop that the High Court held that it is essential that the assessee must be informed that penalty proceedings against him are commenced under the Explanation to sec.271(1)(c). These facts and the decision of the High Court would make it obvious that the case of the assessee before us is distinguishable wherein the AO made only an incidental reference to Explanation 1 under which an amount added in computing the total income is deemed to represent the income in respect of which particulars have been concealed. Nonetheless, the fact remains that the impugned penalty was imposed by the AO with the observation "in the circumstances, the assessee is considered to have furnished inaccurate particulars of income in respect of the amount added under the head capital gains". In para 12 of the appellate order the CIT(A) also recorded the finding which reads-

> "Considering the above facts I am of the view that the appellant by way of procuring such a report and relying upon it as the basis of computation of income has furnished inaccurate particulars in terms of sec. 271(1)(c)."

It may be stated that after the hearing was over an affidavit of Shri Natwarlal D. Shroff, Karta of the HUF sworn on 18.6.2001 was filed in the registry with the request that the same may be taken on record and be considered. It is, inter alia, deposed therein that the deponent had honestly and

completely relied upon the professional advise in the matter of valuation of the property and the filing of the income tax return. It is undisputed that the burden of proving that furnishing of the income tax return. It is undisputed that the burden of proving that furnishing of inaccurate particulars of income was not because of fraud and willful neglect of the assessee remains on the assessee. The burden can reasonably be discharged by the assessee by giving his own statement. In CIT vs V. Ponnuswamy Naidu (1995) 214 ITR 185 (Mad) it has been held that it cannot be accepted as a good proposition of law that the statement of the assessee should never be accepted as a good explanation. The conclusion would, of course, differ from case to case. There may be cases in which his statement may not be found sufficient to discharge the burden placed on him. The case of the assessee falls under this category. The CIT(A) has recorded a finding, with which we agree, that the responsibility for the accuracy of the facts stated in the return and the accompanying documents which form the basis of computation of income lies on the assessee. He may take the help of a registered valuer but by taking his help the degree of his responsibility does not get reduced. It is the responsibility of the assessee to verify whether the registered valuer's report is correct or not. This was all the more necessary, when the property of the assessee was situated in a posh locality like Walkeshwar Mumbai and sale thereof by no stretch of imagination would have resulted in loss as observed by the AO.

The decision in CIT vs S.I. Paripushpam 249 ITIR 550 (Mad) will also not render any help to the assessee. In that case the amount of which addition was agreed to by the assessee was an amount which had been set out in an enclosure filed along with the assessee's return of income and it was in this background it was held that the assessee's agreeing to the addition of the amount by itself did not establish fraud or willful neglect without something more. The facts of the assessee's case are totally different as set out earlier."

5. The consideration of the matter by the Tribunal is concluded on facts and cannot be said to suffer

from any error of law.

6. The two judgments relied upon by the learned counsel have no application to the facts of the present case.

7. No substantial question of law arises in this appeal. Dismissed in limine.

(R.M.LODHA, J.)

(J.P. DEVADHAR, J.)